Supreme Court, U.S.
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No. 90-1890

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD E. CLARK,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and WENDELL C. HOOVER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED FOR REVIEW

The Respondents do not agree that this case presents the questions identified by the Petitioner. The case presents the following questions:

1. Whether the language of the agreements between Petitioner and Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") is sufficient to overcome the presumption in favor of arbitration so that litigation of Petitioner's claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), is required.

2. Whether the language of the agreements between Petitioner and Respondent Merrill Lynch which was inserted to comply with Securities and Exchange Commission Rule 15c2-2, 17 C.F.R. § 240.15c2-2, was simply notice of the SEC's position and not a substantive clause of the contract.

LIST OF PARTIES TO THE PROCEEDING

The Petitioner has correctly identified the parties before the Fourth Circuit. Pursuant to Rule 29.1 of the Rules of this Court, the Respondents submit the following list of all parent companies and subsidiaries (except wholly owned subsidiaries) of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.:

Parent: Merrill Lynch & Co., Inc.

Subsidiaries: Merrill Lynch Nomura Management Co., Inc.
Wagner Stott Clearing Corp.

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OPINION BELOW

The opinions below are set out in the Appendix to the Petition for Certiorari. The Respondents note that, on pages 16a and 17a of the Appendix, the numbers of the paragraphs which quote from two different brokerage agreements are reversed, *i.e.*, the paragraph numbered "8" on page 16a should be numbered "11," and the paragraph numbered "11" on page 17a should be numbered "8."

STATUTES AND REGULATIONS INVOLVED

In addition to Securities and Exchange Commission Rule 15c2-2, 17 C.F.R. § 240.15c2-2 (rescinded), the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is involved in this case.

STATEMENT OF THE CASE

The Respondents do not agree that the Petitioner's Statement of the Case is sufficient to outline the questions presented for review. The Respondents therefore provide the following statement:

The Litigation Between the Parties

Petitioner Clark traded securities through Respondents Merrill Lynch and Hoover from 1981 through 1985. Mr. Clark's trading during 1985 gave rise to a dispute between the parties, which in turn led to litigation. The District Court sent all of Mr. Clark's claims to arbitration except his claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). The District Court tried the Section 10(b) claim to a jury, and Mr. Clark obtained a substantial verdict in his favor. Merrill Lynch and Mr. Hoover appealed to the Fourth Circuit, which concluded that the federal securities claim should have been sent to arbitration along with the rest of Mr. Clark's claims. The Fourth Circuit vacated the District Court's judgment and remanded the case with instructions for the District Court to compel arbitration of the Section 10(b) claim.

From 1981 to 1985, Mr. Clark signed numerous brokerage agreements with Merrill Lynch. All agreements executed prior to 1985 — eight in total — provided that "any controversy" arising out of Mr. Clark's transactions shall be arbitrated. Under these agreements, there is no dispute: all of Mr.

Clark's claims, including his Section 10(b) claim, are subject to arbitration.

Mr. Clark executed four additional agreements in the first half of 1985 which provided:

> Except to the extent that controversies involving claims arising under the Federal Securities Laws may be litigated, . . . any controversy between us . . . shall be settled by arbitration. . . .

The District Court concluded that this clause advised the customer "that the courts have held that claims involving the securities laws are not subject to binding arbitration agreements." Appendix to the Petition, p. 18a. The District Court also ruled that the clause did *not* exclude from the agreement to arbitrate any securities claims which in fact were subject to arbitration. Appendix to the Petition, p. 19a. Accordingly, the District Court held that, in light of this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), Mr. Clark's claim under Section 10(b) would be subject to arbitration under this clause. Mr. Clark did not appeal this ruling to the Fourth Circuit, and he did not argue to the Fourth Circuit that this ruling was incorrect. In his Petition to this Court, he glosses over this language, this ruling, and his failure to attack it.

The primary events giving rise to this lawsuit occurred in January 1985. Several months later, on June 24, 1985, Mr. Clark executed a Managed Options Agreement. On the same day, he signed two Standard Option Agreements containing the arbitration clause quoted above. The Managed Options Agreement states:

> Although you have signed a customer agreement form with MERRILL LYNCH that states that you are required to arbitrate any future dispute or

> controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

The District Court ruled that Mr. Clark's entire claim under Section 10(b) should be tried under the Managed Options Agreement. In so ruling, the District Court disregarded language in the Standard Option Agreements, signed the same day, that provided that *they* would control in the event of a conflict:

> Any agreement by me with you, whether previously or hereafter made applicable to any account of mine with you, shall also apply to such option transactions except to the extent which it conflicts with this agreement. ***In the event of a conflict, this agreement shall control***, and where there is no conflict, each provision of each agreement shall apply. (Emphasis supplied.)

This conflict clause appeared not only in the Standard Option Agreements that contained the first "qualified" arbitration clause quoted above but also in other Standard Option Agreements that Mr. Clark had previously signed and that provided that "any controversy" would be arbitrated.

The Respondents appealed to the Fourth Circuit, which held that the qualified arbitration clauses found in the Standard Options Agreement and the Managed Options Agreement "were notice provisions only [under SEC Rule 15c2-2] that did not create a substantive right to litigate federal securities law claims." (Appendix to the Petition, p. 12a.) The Fourth Circuit concluded that arbitration was required under either clause so that there was no conflict between the clauses. The Fourth Circuit did not examine the specific

language of either clause to determine whether, if it were a substantive term of the contract, it required arbitration.

As the Fourth Circuit noted in its opinion of January 31, 1991, Mr. Clark testified that he did not read his brokerage agreements (Appendix to the Petition, p. 12a n. 5), and there is no evidence in the record that he bargained for anything other than arbitration. This is particularly true given the parties' course of conduct in agreeing, in at least eight brokerage agreements signed over a four-year period, to submit *all* claims to arbitration. (Appendix to the Petition, p. 12a.)

SEC Rule 15c2-2

This Court held in 1953 that certain claims under the Securities Act of 1933 could not be arbitrated. *Wilko v. Swan*, 346 U.S. 427 (1953). Other courts extended that holding to claims under the Securities Exchange Act of 1934. *See, e.g.*, cases cited in *McMahon*, 482 U.S. at 225 n.1. Because of those cases, the SEC, effective January 1, 1984, adopted Rule 15c2-2, entitled "Disclosure regarding recourse to the courts notwithstanding arbitration in broker-dealer customer agreements." The SEC adopted Rule 15c2-2 to require brokers to advise parties to arbitration agreements of the SEC's (erroneous) assumption that federal securities claims were not subject to arbitration. The SEC repealed its rule after this Court held, in *McMahon*, 482 U.S. at 238, that claims under § 10(b) were subject to arbitration. *See* Exchange Act Rel. No. 25034, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,163 (Oct. 15, 1987) (SEC rescinded Rule 15c2-2 as "no longer appropriate in light of case law developments.") (Appendix to the Petition, p. 33a.)

Rule 15c2-2 contained specific language that the SEC required brokers to send to their customers before Decem-

ber 31, 1984 if the customer did not sign a new contract containing similar language. The notice stated:

> Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

17 C.F.R. § 240.15c2-2(b). Rule 15c2-2 also provided a grace period until December 31, 1984 for brokerage firms to use their already-printed customer agreements, so long as the notice prescribed above was also given to customers. As the Fourth Circuit concluded, brokerage firms were required after December 31, 1984 to incorporate notice language into their printed customer agreements. (Appendix to the Petition, p. 11a.)

In response to the rule, many brokerage firms placed the specified language or other qualifying language in arbitration agreements. *See Ottenritter v. Shearson Lehman Hutton, Inc.*, 727 F. Supp. 980, 984 (D. Md. 1989). The firms used many different forms of disclosure language, and two different forms were used in Mr. Clark's agreements. The language included in Mr. Clark's Managed Options Agreement is the very language prescribed by Rule 15c2-2 for the notice to customers. The language included in the Standard Options Agreement, as the Fourth Circuit found, is another form of disclosure language used by Merrill Lynch to comply with the rule.

In sum, Rule 15c2-2 was not a substantive provision determining arbitration rights, but was instead a rule requiring disclosure of a view of the law that ultimately was shown to

be incorrect. Mr. Clark signed many agreements to arbitrate claims arising from trading at Merrill Lynch. A number of those agreements were unqualified and, without question, required arbitration of all disputes. The few agreements that contained a qualified arbitration clause were the product of Merrill Lynch's compliance with the notice requirements of Rule 15c2-2.

SUMMARY OF THE ARGUMENT

The Court should deny certiorari because the special facts and circumstances of this case render it an inappropriate candidate for further review. First, Rule 15c2-2 has been rescinded for almost four years, and agreements drafted to comply with it soon should pass from the scene. Thus, disputes about the meaning and effect of language used by brokerage houses to comply with the SEC's rule should not have any long-term effect on the law. Likewise, the division among the Courts of Appeals about the results of compliance with the SEC's rule should not have any long-term effect. The issue is of limited and receding importance.

Second, the Fourth Circuit has compelled arbitration of Mr. Clark's federal securities law claim in this case in accordance with his repeated agreements to arbitrate. Brokerage firms used many forms of language to comply with Rule 15c2-2. Contrary to the clear implication of Mr. Clark's Petition, the controlling contractual clause in this case calls for arbitration. Thus, aside from the issue of whether language used to comply with Rule 15c2-2 is notice rather than a substantive clause of the contract, the actual language used in Mr. Clark's agreements in this case leads to the conclusion that the result in this case is correct. The Fourth Circuit's judgment is correct for this reason as well as for the reasons given by the Court of Appeals.

Third, the Fourth Circuit's ruling in this case puts to rest the lingering effects of an SEC rule that was based on the erroneous assumption that federal securities claims were not subject to arbitration. The Fourth Circuit has reached a fair and just result with respect to the effects of Rule 15c2-2. The Fourth Circuit's decision also advances the clear federal policy in favor of arbitration.

Finally, contrary to the Petitioner's contention, the Fourth Circuit has not intruded into the realm of private contract. The Fourth Circuit simply construed the agreements between the parties, and it did not re-write the agreements or in any way make a new agreement for the parties.

ARGUMENT

Mr. Clark asks the Court to grant certiorari in this case on the ground that the Fourth Circuit's decision conflicts with decisions of other circuits and is incorrect. He over-emphasizes the scope and importance of the question raised, and he incorrectly assumes that the language of his contract, if read as a substantive term of his contract, gives him a right to litigate his claim. The Court should deny Mr. Clark's petition.

1. *Rule 15c2-2 Is Largely A Past Question.*

Rule 15c2-2 was adopted in 1984 and rescinded in 1987. Only contracts that were made during that period (and not superseded by later agreements) are affected by the question of whether language inserted to comply with the rule constitutes mere notice of the SEC's view or is instead a substantive clause of the contract. The question was of "considerable current interest" in the marketplace immediately after this Court's decision in *McMahon* (*see Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 730 (3d Cir. 1989)), but

as Rule 15c2-2 recedes into the past, so will the question presented by this case. In other words, this case is clearly important to the parties, but it should not have any long-term effect on the law.

Beyond the question of whether language inserted to comply with Rule 15c2-2 was mere notice, this case presents only a question of construing specific language of a contract. Brokerage firms used many different forms of language to comply with Rule 15c2-2, and the interpretation of the substantive meaning of one such clause should not greatly affect interpretation of other clauses. In other words, the question of contract construction is largely a case-by-case question.

2. *Mr. Clark's Agreements Call for Arbitration.*

After the Fourth Circuit held that the qualified language in Mr. Clark's agreements was only notice required by the SEC and did not create any substantive contractual rights, the Court of Appeals did *not* further construe the various contracts signed by Mr. Clark. At that point, the specific notice language used was no longer in issue. If the language of Mr. Clark's arbitration clauses is examined, however, and if the presumption in favor of arbitration is followed, then the Court of Appeals was in all events correct in compelling arbitration of the Section 10(b) claim. The Respondents will address this issue before addressing the actual holding of the Fourth Circuit in this case because the Petitioner has strongly implied that, but for the Fourth Circuit's ruling that language used to comply with Rule 15c2-2 is notice only, he would not be compelled to arbitrate his claim under Section 10(b). Mr. Clark is wrong because arbitration is required by the language of his agreements with Merrill Lynch, independent of the conclusion that the clauses are mere notice.

The determination of whether the parties have agreed to arbitrate a dispute is guided by a strong federal policy *in favor of* arbitration. This Court firmly expressed this view in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983):

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

This Court thus follows a presumption in favor of arbitration. "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). As a result, Mr. Clark's agreements with Merrill Lynch must be read with a view toward arbitration. In other words, unless the language of Mr. Clark's agreements requires litigation, arbitration should be ordered. The federal policy is clear and indisputable.

The District Court recognized the federal policy in favor of arbitration and found that, under twelve agreements that Mr. Clark signed, his federal securities claim was arbitrable. Thus, the District Court construed all of Mr. Clark's agreements but one to provide for arbitration. Mr. Clark did not contest that ruling before the Fourth Circuit. He neither cross-appealed nor argued that this construction was not correct.

Any confusion about arbitration in this case was caused by Rule 15c2-2 and centers on the language of the Managed Options Agreement, which is only *one* of Mr. Clark's thirteen

arbitration agreements. Thus, the District Court premised its ultimate ruling against arbitration on its conclusion that Mr. Clark's Managed Option Agreement superseded all other agreements and prevented arbitration of Mr. Clark's claim. Mr. Clark executed the Managed Options Agreement on the very same day that he executed two Standard Option Agreements. Mr. Clark had previously executed three other Standard Option Agreements for his accounts. Each of these Standard Option Agreements provided that *it* was to control in the event of a conflict with any other agreement. (See language cited p. 4, *supra*). *See Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157, 159 (8th Cir. 1991) (giving effect to conflict resolution clause to compel arbitration). If the Managed Option Agreement is interpreted to exclude arbitration, there would then be a conflict with the controlling arbitration language in the Standard Option Agreements. Thus, three of the Standard Option Agreements contained unqualified language compelling arbitration, while the other two contained language stating that "[e]xcept to the extent that controversies involving claims arising under the Federal securities laws may be litigated," all claims were to be arbitrated. Under the undisputed ruling of the District Court, any of the Standard Option Agreements compels arbitration of Mr. Clark's federal securities claim. Mr. Clark is clearly incorrect in implying in his Petition that only the Fourth Circuit's ruling on Rule 15c2-2 notice language compels arbitration in this case. The undisputed record before the Court of Appeals presented a case with no controversy as to the meaning of the arbitration clause in the controlling Standard Options Agreement. Furthermore, the case pre-

sented no controversy as to the governing policy in favor of arbitration.[1]

Thus, even if the Fourth Circuit incorrectly characterized the Rule 15c2-2 language of the agreements as "notice only" rather than "substantive," its decision compelling arbitration of Mr. Clark's claim is correct. The language of the Standard Option Agreements, in and of itself calls for arbitration. The District Court so held, and Mr. Clark did not contend otherwise before the Fourth Circuit. Mr. Clark repeatedly agreed to arbitrate, and the Fourth Circuit's decision is correct for that reason if for no other.

3. *The Case Law in the Courts of Appeals*

The Fourth Circuit, in any event, reached a fair and appropriate result in ruling on the effect of Rule 15c2-2. The Petitioner's discussion of the applicable case law requires this supplemental discussion by the Respondents. The Petitioner is correct in noting a conflict among the circuits, but he misstates the issue and overstates the conflict.

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[1] The District Court's construction of the qualified language of the Standard Option Agreement is supported by decisions of other district courts. *See Axtell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 744 F. Supp. 194, 197-98 (E.D. Ark. 1990); *Nemes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 657, 658-60 (E.D. Mich. 1990); *Esposito v. Hyer, Bikson & Hinsen, Inc.*, 709 F. Supp. 1020, 1021-22 (D. Kan. 1988). *But compare Blue Gray Corps. I and II v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 921 F.2d 267 (11th Cir. 1991) (reaching opposite conclusion). While the Respondents believe that the district courts' construction of the language is correct, the language is *at least* sufficiently ambiguous that arbitration must be ordered under the strong federal policy favoring arbitration. As previously noted, the District Court construed this language to call for arbitration, and Mr. Clark did not contest this conclusion on appeal to the Fourth Circuit.

First, contrary to the Petitioner's contention, the Fourth Circuit did *not* hold that the SEC's rescission of its rule invalidated anyone's contractual agreement to litigate. The Fourth Circuit instead held that language inserted in a contract by a brokerage firm in order to comply with the SEC's rule was notice of the SEC's view and was not a substantive term of the contract. The Fourth Circuit did not re-write the agreement between the Petitioner and Respondent Merrill Lynch. Instead, it construed the contracts in light of their history and the SEC's rule. That does not alter or change the contracts in any way. It merely gives effect to the language as it stood from the beginning.

Second, the Fourth Circuit does not stand against a majority of the circuits, and the circuits' views are not so consistent or uniform as the Petitioner suggests. Thus, the Second Circuit, without discussion, held that language under Rule 15c2-2 that excluded securities claims from an arbitration clause is mere notice and creates no substantive rights. *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 295 n. 5 (2d Cir. 1989). While this Court vacated the Second Circuit's judgment on other grounds, __ U.S. __, 110 S.Ct. 225 (1989), the Second Circuit has not since expressed a different view. *See Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 118 (2d Cir.), *cert. denied*, No. 90-1701 (U.S. June 28, 1991). In addition, one of the decisions cited by Mr. Clark does not even address the question at hand. *Giles v. Blunt, Ellis & Loewi, Inc.*, 845 F.2d 131 (7th Cir. 1988), makes no mention of SEC Rule 15c2-2 and clearly does not consider the effect of the rule on the contract in that case.

The Petitioner also does not accurately address the Fourth Circuit's earlier decision in *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989), and *Jeske*'s relationship to the decisions of other

circuits. The agreement in that case was already in effect when the SEC adopted Rule 15c2-2, and it called for arbitration of all disputes. The Fourth Circuit held that the agreement was *not* affected by the subsequent adoption of the rule, even though the agreement also provided that any of its provisions would be deemed "rescinded or modified" to the extent that they conflicted with laws or regulations. 875 F.2d at 75. The Fourth Circuit applied the SEC's rescission of the rule retroactively and treated the rule as though it had never existed. The Fourth Circuit did not examine whether the broker had complied with the requirements of the rule while it was in effect, and it flatly held that the rule did not create any substantive rights. "[A] party's preference for litigation over arbitration 'does not rise to the level of a substantive right.' " *Id.* (citation omitted).

In this case, the Fourth Circuit logically and fairly applied the principles of its earlier *Jeske* decision when it continued to decline to give substantive effect to a rule that (1) was adopted as the lower courts were changing their view of arbitration of securities claims; (2) was based on the erroneous assumption that such claims were not arbitrable; (3) was of questionable validity from the outset; and (4) has been rescinded. The Fourth Circuit held that the various forms of language employed to comply with the rule were no more than notice of the SEC's position, and it declined to give substantive effect to regulatory language that brokers were required to insert into contracts with their customers. That is wholly appropriate for a rule that is now a dead letter. Moreover, it is entirely appropriate to effectuate the strong federal policy *in favor of* arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25; *see also Mitsubishi Motors Corp.*, 473 U.S. 614 at 626.

Jeske finds support in the decisions of other circuits. The Eleventh, Ninth, and Fifth Circuits, confronted with the issue, have reached the same result as *Jeske*. *Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059 (11th Cir. 1988); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 288 (9th Cir. 1988); *Villa Garcia v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 833 F.2d 545 (5th Cir. 1987). *But see Coffey v. Dean Witter Reynolds, Inc.*, 891 F.2d 261 (10th Cir. 1989), *cert. denied*, __ U.S. __, 111 S.Ct. 43 (1990) (reaching opposite conclusion). Admittedly, the Eleventh, Ninth, and Fifth Circuits, while agreeing with the result in *Jeske*, would approach *this* case differently than the Fourth Circuit. But their position is internally inconsistent and promotes litigation, unlike the Fourth Circuit's decision in this case. On the one hand, those courts treat rescission of Rule 15c2-2 as retroactive and fully effective if the contract provides for arbitration of all disputes, with no qualifying language. In that instance, the contract is enforced without regard for the presence of the rule during some portion of the life of the contract and without regard for compliance or non-compliance with the rule. On the other hand, those courts (and the Third Circuit in *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989)) treat efforts by brokerage firms to comply with Rule 15c2-2 as a substantive term of the contract and thus as a term affecting arbitration. In other words, if a broker made no effort to comply with the SEC rule mandating disclosure language in the contract, those courts would enforce arbitration clauses of the broker. But if the broker included SEC-required notice language in the contract, then the SEC-required notice becomes a substantive clause that may undo the agreement to arbitrate, depending upon the particular language used.

This approach leads to the anomalous result of rewarding noncompliance with the rule and punishing compliance. At the same time, this approach could encourage litigation to construe the different phrases used by brokerage houses in attempting to comply with the rule. This approach also does *not* promote the federal policy in favor of arbitration.

The result in this case, on the other hand, advances the federal policy in favor of arbitration. It declines to give effect to a now-rescinded SEC rule that was premised on an erroneous view of the law. It neither rewards non-compliance with the rule nor punishes compliance, and it does not encourage further litigation. The result in this case also gives effect to repeated agreements between the parties to arbitrate their disputes. The result in this case is fair and appropriate.

4. *The Fourth Circuit's Decision Does Not Intrude Into The Right of Private Contract.*

Petitioner suggests that the Fourth Circuit has set aside a contract between the parties and has improperly intruded into the right of private contract. That is clearly not correct. As previously discussed, the Fourth Circuit did not re-write the agreements between the Petitioner and Respondent Merrill Lynch. The Fourth Circuit instead construed the agreements in light of their history and the SEC's rule requiring notice. The Fourth Circuit found that the qualifying language on which Mr. Clark relied to avoid arbitration was only notice of the SEC's position and was not a substantive clause of the contract. That does not alter or change the contract in any way. It merely construes it.

CONCLUSION

The Fourth Circuit has put Rule 15c2-2 in the past. The Court of Appeals reached a fair and logical result in disposing of an issue that arose only because the SEC sought to impose an erroneous view of the law onto contracts between brokers and their customers. While the Fourth Circuit's decision conflicts with certain other appellate cases, that conflict should have no long-term effect on the law since its pertains only to brokerage agreements executed during the period from 1984 to 1987 and which have not been superseded. The question, while of interest immediately after the SEC rescinded its rule, is of limited and receding importance.

In addition, the controlling arbitration clause in this case, properly construed, calls for arbitration and not litigation. Even if the Fourth Circuit had erroneously put Rule 15c2-2 to rest, the result in this case would not change. Mr. Clark repeatedly agreed to arbitrate any dispute with the Respondents, and there is no evidence in the record to suggest that he bargained for anything other than arbitration. Indeed, he testified that he did not even read his brokerage agreements.

Finally, this case does not present any question about judicial interference in private contracts. The Fourth Circuit did not hold that rescission of Rule 15c2-2 changed a substantive clause of a contract into a notice clause and thus worked a change in the parties' agreement. The Fourth Circuit instead held that the contract's language was (and always had been) notice only. The Fourth Circuit simply construed the contract as agreed to, and it did not rewrite the agreement.

The Court should deny the Petition for Certiorari.[2]

Respectfully submitted,

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[2] The Fourth Circuit did not decide certain additional issues in this case that would arise only if the jury's verdict were reviewed on its merits. For example, Merrill Lynch and Mr. Hoover strongly contend that Mr. Clark's claimed damages at trial were unsupported by evidence and were based on contradictory theories. These questions are not before the Court and would be before the Fourth Circuit only if the Court were to grant the petition for certiorari and reverse the Fourth Circuit's decision.